Supreme Court, U.S.
FILED

95.235 AUG 9 1995

OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

_____ Term 19___

SKIP KIRCHDORFER, INC.,

PETITIONER

vs.

THE UNITED STATES

RESPONDENT

---

On Petition for Writ of Certiorari
from the United States Court of Appeals
For the Federal Circuit

---

Laurence J. Zielke
William H. Mooney - Of Counsel
PEDLEY, ZIELKE & GORDINIER
1150 Starks Building
455 South Fourth Avenue
Louisville, Kentucky 40202
(502) 589-4600

26 pp

## QUESTIONS PRESENTED FOR REVIEW

The issue presented arises out of a taking in violation of the Fifth Amendment to the Constitution by the United States Navy of the personal property of Skip Kirchdorfer, Inc., in December 1988, on the United States Naval Base on Guantanamo Bay, Cuba. The United States Court of Appeals for the Federal Circuit held that despite the unconstitutional taking that the government could escape payment of just compensation by shifting the burden on the property owner whose property was taken to take affirmative steps to end the taking.

The issue presented for this Court is whether the government can escape payment of just compensation when the government never returned possession or control of the personal property.

## TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . i

TABLE OF CONTENTS . . . . . ii

OPINIONS . . . . . iii

TABLE OF AUTHORITIES . . . . . iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED . . . . . 1

JURISDICTION . . . . . 2

STATEMENT OF THE CASE . . . . . 3

ARGUMENT . . . . . 5

APPENDIX . . . . . 8

**OPINIONS**

1. Skip Kirchdorfer, Inc. v. United States, 26 Cl.Ct. 666 (1992).

2. Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573 (Fed.Cir. 1993).

3. Order and Judgment of the United States Court of Federal Claims, Case No. 337-89C, dated July 5, 1994.

4. United States Court of Appeals for the Federal Circuit Judgment in Case No. 94-5154, styled Skip Kirchdorfer, Inc. (Plaintiff/Appellant) v. United States (Defendant/Appellee), dated May 12, 1995.

## TABLE OF AUTHORITIES

28 U.S.C. § 1254 . . . . . 3

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. U.S. Const. amend. V.

## JURISDICTION

The United States Court of Appeals for the Federal Circuit entered a judgment affirming the decision of the United States Court of Federal Claims on May 12, 1995. No rehearing was requested. Jurisdiction is conferred upon this Court to review the judgment pursuant to 28 U.S.C. § 1254.

## STATEMENT OF THE CASE

This case arises from the unprecedented actions of the United States Navy which directly interfered in a dispute between a civilian general contractor and subcontractor performing work on the United States Naval Base on Guantanamo Bay, Cuba. The United States Court of Appeals for the Federal Circuit found that on December 13, 1988, Navy security personnel forced open the doors of a warehouse owned and operated by SKI and cut locks to gain access to this warehouse. All control of the warehouse was then turned over to the general contractor with whom SKI had a dispute. The issue left unresolved on the initial appeal by the United States Court of Appeals for the Federal Circuit was what amount of "just compensation" was due SKI. The Court of Appeals remanded the action

back to the United States Court of Federal Claims for determination of this issue.

SKI argued to the lower court that at no time did the Navy ever offer to return possession of the warehouse to SKI. Because SKI never had the warehouse returned to its possession, SKI argued that the taking continued, at the very least from December 13, 1988, the date that the Navy took physical possession, until the eventual removal of the warehouse by a third party in August of 1991. The United States Court of Federal Claims focused upon whether SKI made any attempts to regain possession of the personal property instead of focusing upon what steps, if any, were taken by the Navy to return SKI's property.

Federal jurisdiction was proper in the United States Court of Federal Claims because the case rested upon the

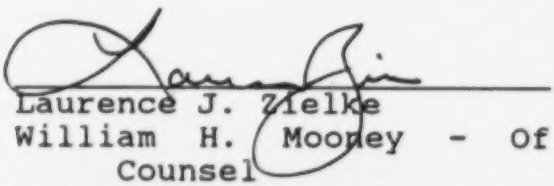
interpretation of the Fifth Amendment of the United States Constitution.

## ARGUMENT

The Petitioner, SKI, respectfully submits that this Court should grant this Petition for Writ of Certiorari because the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit has addressed an important question of federal law concerning the interpretation of the Fifth Amendment of the United States Constitution in a manner which is inconsistent with the language of this Constitutional Amendment. SKI submits that the Fifth Amendment was intended to protect the citizens of the United States from an unconstitutional taking by a governmental entity and that an unconstitutional taking does not cease unless and until the governmental entity returns the property to the individual property owner. The lower courts have

erred in this case by shifting the burden of proof upon the property owner instead of the governmental entity to establish the date upon which the unconstitutional taking ended; thereby improperly limiting the award of "just compensation."

Respectfully Submitted,



Laurence J. Zielke
William H. Mooney - Of Counsel
Pedley, Zielke & Gordinier
1150 Starks Building
455 South Fourth Avenue
Louisville, Kentucky 40202
(502) 589-4600

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

_____ Term 19___

SKIP KIRCHDORFER, INC.,

PETITIONER

vs.

THE UNITED STATES

RESPONDENT

---

On Petition for Writ of Certiorari
from the United States Court of Appeals
For the Federal Circuit

---

**APPENDIX**

---

Laurence J. Zielke
William H. Mooney - Of Counsel
PEDLEY, ZIELKE & GORDINIER
1150 Starks Building
455 South Fourth Avenue
Louisville, Kentucky 40202
(502) 589-4600

United States Court of Appeals
for the Federal Circuit

CORRECTED

94-5154

SKIP KIRCHDORFER, INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

**JUDGMENT**

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS
in CASE NO(S). 337-89C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam: (Mayer, LOURIE, and RADAR, Circuit Judges):

**AFFIRMED**. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT
DATED May 12, 1995 Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: JUL -3 1995

**In the United States Court of Federal Claims**

No. 337-89C

(Filed: July 5, 1994)

---

SKIP KIRCHDORFER, INC.,

Plaintiff

v.

THE UNITED STATES,

Defendant

**THIS ORDER WILL NOT BE PUBLISHED IN THE U.S. COURT OF FEDERAL CLAIMS REPORTER BE-IT DOES NOT ADD SIGNIFICANTLY TO THE BODY OF LAW AND IS OF WIDESPREAD INTEREST**

---

**ORDER**

---

Pursuant to order, on June 30, 1994, oral argument was heard in the United States Court of Federal Claims, Washington, D.C., on the remand from the Court of Appeals for the Federal Circuit "to determine the date of abandonment and value of SKI's taken property interest." Materials and papers relevant to the argument were identified on the record. Prior proceedings in this court were reported in an opinion filed April 18, 1992. Kirchdorfer v. United States, 26 Cl.Ct. 666. Prior proceedings in the Federal Circuit were reported in a decision issued October 12, 1993. Kirchdorfer v. United States, 6 F.3d 1573.

Appearances

For Plaintiff: Laurence J. Zielke, Esq.
Joseph C. (Skip) Kirchdorfer
For Defendant: Mark D. Rubino, Esq.

Both parties agree that the taking began on December 13, 1988. Plaintiff contends the date of abandonment was August 31, 1991, and that the fair rental value of the property interest taken for the period is $480,000, which, with interest at the rate of 8 percent, increases the total award to $807,032.80. Defendant contends that SKI abandoned the warehouse almost immediately after the taking on December 13, 1988, or, at the latest, all rights were abandoned on August 16, 1989, when SKI refused to dismantle the warehouse after the JV restored complete control. Defendant contends that fair rental value is not appropriate for property located on the Naval Base, that the intrusion was minimal, and that SKI suffered no economic loss to support its conclusion that SKI is entitled to zero compensation for the property interest taken.

The date of abandonment and the value of the property interest taken are illuminated by a review of the facts existent on the taking date. First, the property is a temporary structure, personal property, located on a Naval Base in a foreign country. SKI did not have a fee, and the property taken was not real estate. Principles of valuation applicable to takings of residential dwellings, or land for road building or

dam construction purposes, have little relevance to this taking of personalty on the Naval Base.

The warehouse was erected pursuant to the provisions of a fixed price subcontract in the amount of $4,250,000, to provide tools, equipment, and labor in a "turnkey" prime contract for construction of 125 units of family housing on the Base (Project). Construction of the Project was completed and beneficial occupancy was given as to all housing units by August 21, 1988. As of September 30, 1988, SKI had been paid $4,073,058 for work on the fixed price subcontract, and the balance owed was $16,963. As of that date, legal proceedings were underway on SKI's claims to the prime contractor for delays, nonpayment, and extended overhead amounting to $940,000.

After August 1988, all of SKI's work on the Base was in the process of winding down. SKI did not work on the Project after August 30, 1988. Prior to December 1988, SKI's subcontract had been terminated by mutual agreement. By that time, SKI's labor force of 250 to 300 workers had been reduced to 15-20 workers. Numerous items in the Project needed completion, and workmanship deficiencies directly attributable to SKI's performance, and for which SKI was responsible, were substantial. SKI's obligation under the subcontract to remove the warehouse at its own expense upon completion of the work is relevant to the abandonment issue. SKI had an interest in avoiding the liability and costs involved

in removing or dismantling the warehouse. Additionally, access to the warehouse was a bargaining item in negotiations with the JV and the ROICC relative to completion of the Project and SKI's claims under the prime contract.

SKI had been paid for its capital investment in the warehouse. During the mobilization period SKI purchased, at a total cost of $63,105, and had shipped to Cuba materials for a 120' by 300' building to be used as the office and warehouse/shop facility. Progress payments for mobilization paid to SKI included $150,000 for this facility.

The Federal Circuit found that SKI had fundamental property interests in the warehouse. The taking was a permanent physical occupation and not a mere temporary trespass. The taking began with the forced entry and ended with abandonment.

Plaintiff contends that the property taken included the entire warehouse. Defendant, on the other hand, argues that the taking of SKI's property was limited to very specific property interests, primarily, the right to exclude. Defendant contends only the value of the rights that the Federal Circuit identified are relevant to valuation of the taking. Defendant misinterprets the holding of the Federal Circuit. The Federal Circuit used the examination of the particular rights involved in plaintiff's ownership of the warehouse as the analytical basis for its determination of whether or not property was taken. Each of those identified

rights - right to exclude, right to dispose of upon completion of Project, right to control access, right to control use - rather than being the subject of a taking itself, is relevant to whether a taking of the warehouse as a whole occurred. Thus, because SKI's right to exclude others was disturbed, the warehouse was "taken" under the Fifth Amendment.

Plaintiff's fundamental property interest in the warehouse as a whole, however, was circumscribed by the nature of its location and the contractual rights and obligations relative to its existence. The right to dispose of the warehouse could not be exercised until completion of the Project. The right to control use of the warehouse was subordinate to contract provisions requiring storage of Project materials and offices for the JV. SKI's right to exclude was limited to security maintenance, and to exclusion of strangers to the prime contract and the subcontract. Under the contracts, SKI could not exclude representatives of the JV from access to Project materials stored in the warehouse. Termination of the subcontract did not destroy these rights. The right to sell, or to move, the warehouse was the subject to the approval by the Navy. The expectancy - that was a fundamental property interest which arose from the custom and practice at Guantanamo Bay to allow contractors to continue to use the warehouse after completion of the Project - required the approval of the Navy or acquiescence by the Navy.

On the taking date, SKI had in the warehouse tools and materials that were related to other contracts as well as SKI's own tools and supplies related to the Project. After the taking date, SKI used facilities at the Old Corral for storage of tools and materials that it maintained for work outside the scope of its subcontract for the Project. SKI's materials, tools and supplies that were removed from the Sherman Avenue warehouse, unless they were shipped back to the United States, after removal also were stored at the Old Corral.

Determination of the time of abandonment is primarily a factual inquiry: How did SKI deal with the warehouse after the taking? On December 19, 1988, immediately after the break-in by the Navy, plaintiff filed a suit alleging a taking, among other things. No attempt was made to regain its property interest in the warehouse from the Navy before seeking judicial compensation, notwithstanding the fact that plaintiff was assured by the Navy that it still had free access to the warehouse. Despite SKI's clear ability to enter and use the warehouse, the only purpose for which plaintiff came to the warehouse was to remove its materials. Soon after filing suit (almost immediately in view of the holiday season) on January 7, 1989, plaintiff began a large scale removal of materials from the warehouse. Plaintiff's removal effort continued through March, 1989. By this point, the only materials left in the warehouse were useless or damaged. SKI's refusal to cooperate in warehouse operations available after the

taking, and its actions to abandon the property by such refusal, were completely unreasonable.

Other than the removal of plaintiff's materials, the record contains no evidence that SKI took any action with regard to the warehouse. Mr. Kirchdorfer stated that he made requests to the Navy for return of the warehouse, however, any such requests were not documented and have not been proven. Plaintiff ignored the JV's August 16 and August 28, 1989, correspondence concerning its obligation under the subcontract to remove the warehouse. There were no contracts subsequent to December 13, 1988, for which plaintiff requested or received approval to use the Sherman Avenue warehouse. During this time, plaintiff used the warehouse at the Old Corral area for its continuing contracts. Facts in the record demonstrate that plaintiff's only ongoing connection with the warehouse was for removal of its materials. The record supports the conclusion that SKI had abandoned the warehouse by March 31, 1989, upon the removal of the last category 3 materials from the warehouse.

Plaintiff contends the proper measure for valuing the taken property interest is fair rental value - which plaintiff puts at $5 per sq. ft. This amount is based solely on the opinion testimony of Mr. Kirchdorfer. The only evidence that even approaches an arms length rental transaction is the rental to the Kelley Company at $250 per month for two offices. The ROICC did not object to this arrangement because Kelley Company, as a

prime contractor on the Base, was in the limited group privileged to be, and to do business, on the Base. There is no evidence that SKI ever rented or sought to rent storage space in the warehouse.

Valuation of interest that was taken is calculated on the basis of potential income that was lost as a result of the taking - the fair rental value. This measure of compensation, for the period December 13, 1988, to the date of abandonment on March 31, 1989, amounts to $24,062.50. In addition to this amount, plaintiff is entitled to interest from the date of taking to the date of payment at a rate determined in accordance with the method provided in the Contract Disputes Act (CDA). 41 U.S.C. § 611 (1988). See Hedstrom Lumber Co. v. United States, 7 Cl.Ct. 16, 33-34 (1984); Jones v. United States, 3 Cl.Ct. 4, 7 (1983). Simple interest is to be calculated on the above valuation amount. Nothing in this record would justify calculation of just compensation by inclusion of compound interest. See Whitney Benefits, Inc. v. United States, 30 Fed Cl. 411, 414-16 (1994).

At the close of argument, a different valuation amount, which as a result of a mathematical error, was stated. In order to eliminate any confusion between this order and the calculations in the transcript, the following steps in the calculation are set forth:

a) Office space in the warehouse amounted to 1,000 square feet, which was divided into five offices.

b) Precise dimensions for each office are not established in the record; it is assumed all were of equal size.

c) Two of the offices (40 percent of total office space) were occupied by Kelley Company at a rate of $250 per month for both offices.

d) Forty (40) percent of the total office space equals 400 square feet.

e) $250 divided by 400 square feet equals $0.625 per square foot.

f) Total value of 1,000 square feet office space equals $625 per month.

g) Warehouse space was on a dirt floor, and was otherwise inferior to office space. It is assumed that the rate for warehouse space was 0.5 of the rate for office space, i.e. $0.3125 per square foot.

h) Available warehouse space was 35,000 square feet. Project materials at a minimum occupied 15,000 square feet of the warehouse.

i) Twenty thousand square feet were available for rental.

j) Twenty thousand square feet times $0.3125 equals $6,250 per month.

k) Total value of warehouse space ($6,250 per month) plus office space ($625 per month) totals $6,875 per month.

l) December 13, 1988, to March 31, 1989, is 3.5 months.

m) 3.5 times $6,875 equals $24,062.50.

n) The total fair rental value of SKI's interest in property taken on December 13, 1988, is $24,062.50.

Just compensation includes interest from the date of taking to the date of payment. The rate of interest is that established under the method required in the Contract Disputes Act, 41 U.S.C. § 611.

IT IS ORDERED:

The Clerk is directed to enter judgment for plaintiff in the amount of $24,062.50, plus simple interest on that amount calculated from December 13, 1988, to the date of payment at rates determined under the method provided in 41 U.S.C. § 611. No costs.

Kenneth R. Harkins, Senior Judge

**In the United States Court of Federal Claims**

**No. 337-89 C**

SKIP KIRCHDORFER, INC.,

**JUDGMENT**

v.

THE UNITED STATES

Pursuant to the court's order of July 5, 1994,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff recover of and from the United States the sum of $24,062.50 together with interest pursuant to 41 U.S.C. § 611, calculated from December 13, 1988, to the date of payment. No costs.

David A. Lampen
Clerk of Court

July 5, 1994

By:
Deputy Clerk

**In the United States Court of Federal Claims**

**No. 337-89 C**

SKIP KIRCHDORFER, INC.,

**CORRECTED JUDGMENT**

v.

THE UNITED STATES

Pursuant to the court's order of July 5, 1994,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff recover of and from the United States the sum of $24,062.50, plus simple interest on that amount calculated from December 13, 1988, to the date of payment at rates determined under the method provided in 41 U.S.C. § 611. No costs.

David A. Lampen
Clerk of Court

July 12, 1994 By:
Deputy Clerk